Supreme Court, U.S.
FILED
NOV 23 2005
OFFICE OF THE CLERK

No. 04-1527

IN THE

Supreme Court of the United States

S.D. WARREN COMPANY,
Petitioner,

v.

BOARD OF ENVIRONMENTAL PROTECTION,
Respondent.

On Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF OF THE WESTERN URBAN WATER COALITION AS *AMICUS CURIAE*

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November 23, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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BRIEF OF THE WESTERN URBAN WATER COALITION AS *AMICUS CURIAE*

In accordance with the Court's Rule 37, the Western Urban Water Coalition ("WUWC") has received written consents of counsel for the parties to file this brief as *amicus curiae.* Copies of the written consents have been filed with the clerk.

INTEREST OF *AMICUS CURIAE*

WUWC is a national association of municipal water utilities that serve most of the largest cities in the western United States. The charter of WUWC members is to provide a reliable, high-quality urban water supply for present and future water users. Urban water supplies must be adequate to accommodate rapid regional growth, sustain people, and maintain and build the economy, while protecting and enhancing environmental values. WUWC members currently

serve over 31 million urban water consumers in Arizona, California, Colorado, Nevada, Utah and Washington.[1]

Members of WUWC own and operate water supply projects. These projects consist of water conduits, reservoirs, hydroelectric facilities, power houses, transmission lines and other facilities involved in water supply and water transfer. These facilities are essential to the ability of WUWC members to fulfill their mission of serving the water resource-related needs of the majority of the population of the western states.

If the Court upholds the decision of the Maine Supreme Judicial Court in *S.D. Warren Co. v. Bd. of Envtl. Prot.*, 868 A.2d 210 (Me. 2005), it could result in the WUWC members being required to obtain additional certifications for new developments or facilities pursuant to section 401 of the Clean Water Act, 33 U.S.C. § 1341. More significantly, however, WUWC members are concerned that the resolution of this case, through some statutory construction of section 401, might also be applied to 402 of the Clean Water Act, *Id.* at § 1342, in a manner that disrupts existing law regarding the National Pollutant Discharge Elimination System ("NPDES") permitting requirements found in section 402. WUWC members operate hundreds of dams and water diversion and conveyance facilities that are needed to deliver public water supplies to urban areas throughout the western United States. These facilities have never been required to obtain NPDES

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[1] WUWC represents the following urban water utilities: Arizona—Central Arizona Project, City of Phoenix, City of Tucson; California—East Bay Municipal Utility District, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utilities Commission, Santa Clara Valley Water District; Colorado—Denver Water Department, City of Aurora; Nevada—Las Vegas Valley Water District, Southern Nevada Water Authority, Truckee Meadows Water Authority; Utah—Central Utah Water Conservancy District; and Washington—Seattle Public Utilities, City of Seattle.

permits for the movement of water. Requiring NPDES permits would unnecessarily and inappropriately interfere with other regulatory requirements, and would have serious economic and operational consequences to the provision of essential water supplies.

SUMMARY OF ARGUMENT

The position WUWC is advocating as *amicus* is simple: This case concerns section 401 only and does not pertain to the Clean Water Act's section 402 permitting requirements. WUWC believes that grounds exist, some of which are briefed by other parties, to reverse the Maine court's holding regarding the section 401 issue presented to the Court. However, WUWC notes that, as described below, there are important differences between the language, origins and purposes of sections 401 and 402. Section 401 was enacted to ensure that the construction and operation of projects that require federal licenses or permits and that may result in a discharge do not cause a violation of applicable provisions of state water quality law. Congress designed section 402, on the other hand, to regulate point source discharges of pollutants to navigable waters. Both section 401 and section 402 employ the common term "discharge," but "discharge" is not and should not be defined in the same way in both provisions. Consequently, activities that are subject to section 401's certification requirement are not necessarily subject to section 402's permitting requirement. Resolution of this case in a manner that defines "discharge" in the same way for both provisions could have the unintended and significant consequence of imposing section 402 permitting requirements on water transfer and diversion activities.

ARGUMENT

A. Dams, diversions and water conveyances do not currently require section 402 permits.

The Clean Water Act prohibits the discharge of pollutants unless authorized pursuant to the Act. 33 U.S.C. § 1311; *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 102 (2004), *reh'g denied*, 541 U.S. 1057 (2004). The primary way in which discharges are authorized under the Act is through section 402's NPDES permitting program. To this end, section 402 "requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *Miccosukee*, 541 U.S. at 102. Either the Environmental Protection Agency ("EPA") or state agencies that have developed EPA-approved permitting programs issue NPDES permits. 33 U.S.C. § 1342(a)(1). NPDES permits contain technology-based effluent limitations as well as limitations designed to ensure compliance with state-adopted water quality standards. *Id.*

According to EPA's long-standing interpretation of the Clean Water Act, operators of dams and hydroelectric facilities are not required to obtain NPDES permits under section 402, unless these facilities introduce grease, oil or other pollutants to the water that passes through or over the facilities. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). The courts of appeals for both the Sixth and District of Columbia Circuits consistently have upheld EPA's interpretation. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 581 (6th Cir. 1988); *Gorsuch*, 693 F.2d at 167.

Last term, in *Miccosukee*, 541 U.S. 95, the Court considered the related question of whether water diversion and conveyance facilities are required to obtain section 402 NPDES permits. Although the Court did not resolve the broad question whether section 402 permits may ever be required for a water diversion or conveyance facility, the

Court did hold that a permit was not required for facilities that merely convey water from one portion of a waterbody to another portion of the same waterbody. *Id.* at 112.

Since the Court's decision in *Miccosukee*, EPA has formally articulated its interpretation of section 402's permitting requirement with respect to water diversions and conveyances. *See* Memorandum from EPA General Counsel Ann R. Klee and Assistant Adm'r for Water Benjamin H. Grumbles, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers*, *available at* http://www.epa.gov/ogc/documents/water_transfers.pdf. According to EPA, the mere transfer of water does not constitute a discharge of pollutants subjecting the activity to permitting under section 402 the Clean Water Act, even if the water is transferred from one water body to another. *Id.* at 2-3, 18, n.18. This formal interpretation confirmed EPA's long-standing practice, and is consistent with the earlier circuit court decisions involving dams. *Id.* at 2-3, 9, 19. EPA further has indicated its intention to undertake a rulemaking to adopt regulations consistent with this formal interpretation. *Id.* at 3, 19.

EPA's long-standing interpretation and practice, taken together with the Court's decision in *Miccosukee* and prior circuit court decisions concerning dams, confirm that hydroelectric, diversion or conveyance facilities need not obtain NPDES permits under Clean Water Act section 402 for mere water movement.

WUWC believes that this legal interpretation is correct and has tremendous practical importance. Tens of thousands of dams, reservoirs, canals, tunnels, ditches and pipelines are used to convey water in the United States. Particularly in the western United States, many large diversion projects are required to deliver water to urban and agricultural places of use and, in many cases, precipitation falls as snow and must

be captured and stored for future use. Requiring NPDES permits to authorize the continued use of these facilities would have dire economic and operational implications.

The process of obtaining NPDES permits is time-consuming and costly for both the permitting agencies and applicants. The need to issue thousands of new permits would overwhelm permitting agencies that already suffer from significant permitting backlogs. Before permits could be issued, regulators would have to develop permitting conditions appropriate for water conveyance facilities that are very different from the industrial and waste water discharge facilities currently regulated under the NPDES program. Once developed, permitting requirements could be costly. In fact, given the volume of water conveyed in many of these facilities, any sort of water quality treatment likely would be impractical or infeasible.

Applying the NPDES permitting requirements might also fundamentally alter long-established allocations of water and the ability to utilize water rights granted under state law. The historic federal/state balance over land and water use would be fundamentally altered without any clear Congressional directive to do so. Sections 101(b), (g) and 510 of the Clean Water Act specifically preserve state authority to allocate water. 33 U.S.C. §§ 1251(b), (g); 1370(2).

The significant consequences of extending section 402's permitting requirement to these types of facilities have not been considered in the record before the Court. However, because section 401 and section 402 share the term "discharge," a ruling in this case that affects the interpretation of the term "discharge" could subject water transfer and diversion activities to NPDES permitting in the future.

B. Facilities subject to section 401's certification requirement are not necessarily subject to section 402 permitting requirements.

In addition to the precedential and practical reasons discussed above, the differences between the language and purposes of sections 401 and section 402 also counsel against imposing a common definition in this case. The case before the Court concerns the applicability of the state certification requirement found in section 401 of the Act only.

1. *A plain reading of sections 401 and 402 reveals significant differences between the applicability of these regulatory requirements.*

Section 401 provides that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1). "The required certification must provide that such discharge will comply with . . . applicable water quality standards . . . as well as with 'any other appropriate requirement of state law.'" *Alabama Rivers Alliance v. Fed. Energy Regulatory Comm'n*, 325 F.3d 290, 293 (D.C. Cir. 2003) (quoting 33 U.S.C. § 1341(d)). This certification requirement differs from section 402's permit requirement in key respects.

Section 401's certification requirements are triggered by activities that "*may* result in any discharge." 33 U.S.C. § 1341(a)(1) (emphasis added). Section 402, however, requires a permit only for actual discharges. *See* 33 U.S.C. § 1342(a)(1). *See also Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency*, 399 F.3d 486, 505 (2d Cir. 2005) (section 402 "gives the EPA jurisdiction to regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves." (emphasis in original)).

Furthermore, section 401 uses the term "discharge" without qualification, whereas section 402 requires a permit only for the "discharge of pollutants." The Act does not provide a definition of "discharge." Instead, it states that "[t]he term 'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16) (emphasis added). Conversely, the Act provides a detailed definition of "discharge of a pollutant" as that term is used in connection with the section 402 permitting program:

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source [and] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

Id. at. § 1362(12). "Discharge" when used alone thus encompasses, but is broader than, a "discharge of pollutants." Therefore, although discharges of pollutants that require a permit under section 402 may also be discharges for purposes of section 401, these definitions plainly indicate that some activities that constitute a "discharge" requiring section 401 certification do not constitute a "discharge of pollutants" requiring a section 402 permit.

Moreover, the courts of appeals consistently have recognized differences in the scope of sections 401 and 402. In *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998), the Ninth Circuit explained that the term "discharge" used in section 401 "is the broader term because it includes all releases from point sources, whether polluting or nonpolluting." Similarly, in *North Carolina v. Federal Energy Regulatory Comm'n*, 112 F.3d 1175, 1187 (D.C. Cir. 1997), the District of Columbia Circuit acknowledged that section 402's permitting program has a much narrower focus "on the regulation of pollutants" as opposed

to "the general regulation of project discharges" implemented by section 401.

Indeed, Congress' inclusion of the term "discharge" elsewhere in the Clean Water Act reflects the broader scope of the term when used alone. Specifically, throughout other portions of section 402 and the Act, Congress consistently qualified its use of the term "discharge," thereby indicating a clear recognition that when used unconditionally, as in section 401, "discharge" has a generalized, broad meaning. *See, e.g.*, 33 U.S.C. § 1342(a)(4), (5) (referencing permits for discharges "under section 407" (refuse pollution from floating vessels)); 33 U.S.C. § 1342(b)(8) (referencing permits for a "discharge from a publicly owned treatment works"); 33 U.S.C. § 1342(l)(1) (exempting "discharges composed entirely of return flows from irrigated agriculture"); 33 U.S.C. § 1342(l)(2) (exempting "discharges of stormwater runoff from mining operations or oil and gas . . . operations"); 33 U.S.C. § 1344 (creating permit program for the "discharge of dredged or fill material").

2. *Sections 401 and 402 serve different purposes.*

In addition to the significant differences in their language, section 401 and section 402 serve different purposes. Congress enacted these provisions at different times and for very different reasons.

Section 401's certification requirement pre-dated the Clean Water Act.[2] Congress originally enacted the certification requirement as part of the Water and Environmental Quality Improvement Act of 1970, Pub. L. No. 91-224, § 103, 84 Stat. 91 (1970); *see also* Conf. Rep. No. 91-940 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2712, 2740-41. The 1970 Act amended the Refuse Act to require all federal facilities to

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[2] When promulgated in 1972, the Clean Water Act was known as the Federal Water Pollution Control Act.

comply with water quality standards adopted by states, a requirement that is virtually identical to the one now found in Clean Water Act section 313, and further amended the Refuse Act to require private applicants for federal permits or licenses to obtain certifications from states that their proposed activities would also comply with state water quality standards.[3] *See* 33 U.S.C. §1323.

When Congress enacted these provisions in 1970, there was no comprehensive federal regulation of water quality. *Envtl. Prot. Agency v. California ex rel State Water Res. Control Bd.*, 426 U.S. 200, 202-03 (1976). Instead, water quality regulation relied primarily upon each state's development and enforcement of water quality standards. *Id.* Congress adopted these provisions to ensure that federally owned and licensed facilities would comply with state efforts to regulate water quality. *Id.* at 209, n.19. In fact, the section of the statute was entitled "Cooperation by All Federal Agencies in the Control of Pollution." Pub. L. No. 91-224, § 103, 84 Stat. 91 (1970).

In 1972, when Congress promulgated the Clean Water Act, it made only minor modifications to these provisions. The House Report explains that "Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act." H.R. Rep. No. 92-911, at 121 (1972), *reprinted in* 1 Congressional Research Service,

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[3] Pub. L. No. 91-224, § 103 amended section 21(b) of the Refuse Act to provide in part:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that there is reasonable assurance . . . that such activity will be conducted in a manner which will not violate applicable water quality standards.

A Legislative History of the Water Pollution Control Act Amendments of 1972 (hereinafter "Legislative History") at 808 (1973). "The purpose of the certification mechanism . . . is to assure that Federal licensing or permitting agencies cannot override State water quality requirements." S. Rep. No. 92-414 at 69 (1971), *reprinted in* 2 Legislative History at 1487.

In contrast, Congress adopted section 402, which establishes the NPDES permitting program, for the first time in 1972. Pub. L. No. 92-500, § 2, 86 Stat. 880 (1972). Congress recognized that previous efforts to protect water quality had failed, and concluded that strong national standards and an enforceable permit system were necessary to control pollution from industrial and municipal point sources. *See* H.R. Rep. No. 92-911, *reprinted in* 1 Legislative History at 189; S. Rep. No. 92-414, *reprinted in* 2 Legislative History at 1422-25.

At the same time, however, Congress acknowledged that the NPDES permit system was not intended to address all sources of water pollution. S. Rep. No. 95-370 (1977), *reprinted in* 1977 U.S.C.A.A.N. 4366. In particular, Congress did not intend that NPDES permits regulate land use or the allocation of water. *Pronsolino v. Nastri,* 291 F.3d 1123, 1127 (9th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003); *Gorsuch,* 693 F. 2d at 178-79, n.67. In section 510 of the Act, Congress expressly preserved state control in these areas:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter,

> such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard or standard of performance under this chapter. . .

33 U.S.C. § 1370. Section 510 further provides:

> Except as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Id. at § 1370(2). *See also id.* at §§ 1251(b), (g).

In this way, the 1972 enactment represents Congressional intent to establish a comprehensive water quality regulatory scheme in which section 402's permitting program regulated a subset of activities that might affect water quality. Congress was careful to leave intact and provide an important role in this comprehensive regulatory scheme for state regulation of water allocation, land use and non-point source pollution.

Given the different origins and purposes of sections 401 and 402, as well as their different statutory language, operable terms, such as "discharge," should not necessarily have a common construction. That is particularly true if the result were that activities requiring section 401 certification necessarily would also require a section 402 NPDES permit.

CONCLUSION

For the foregoing reasons, WUWC respectfully requests that the Court not employ a construction of section 401 in its resolution of this case that might hereafter be applied to section 402 of the Act.

Respectfully submitted,

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November 23, 2005